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No. 199

Supreme Court of the United States

October Term, 1959

MARY JO WILLIAMS, Administratrix of the ESTATE OF PERCY L. WILLIAMS and MARY JO WILLIAMS, Transferee of the assets of PERCY L. WILLIAMS,
Defendants-Appellants,

vs

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Court Index Press, Inc.—Law Printers—309 Walnut Street, Cincinnati 2, Ohio

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Defendants-Appellants,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray for a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, which affirmed a judgment of the United States District Court for the Southern District of Ohio.

I.

THE OPINIONS OF THE COURT BELOW

The Opinion of the Court of Appeals for the Sixth Circuit was rendered February 27, 1959, and a Petition for re-

hearing overruled April 10, 1959, and is reported in 264 F.2d 227. The Opinion of the United States District Court is reported in 164 F. Supp. 874, and are attached hereto (App. 3a to 9a).

II.

JURISDICTION

1. The jurisdiction of this Court to entertain a Petition for a Writ of Certiorari and the allowance thereof is provided for in Judicial Code — 28 U.S.C. Sec. 1254.

2. The date of the Judgment of Affirmance to be reviewed is February 27, 1959, together with the overruling of the Petition for rehearing on April 10, 1959.

3. The ruling of the Court of Appeals for the Sixth Circuit is in conflict with several other decisions of the Court of Appeals and is directly contrary to the decision of this Court in the case of *Flora* v. *U. S. A.*, 357 U.S. 63.

4. The jurisdiction of this Court is sustained by Rule 19 Sec. 1 (b).

III.

STATEMENT OF THE CASE

A summary statement of the matters involved is as follows: (taken from 264 F.2d 227)

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Action by United States against income taxpayer's transferee, personal representative, for foreclosure of Federal Lien for Income Taxes. Transferee - personal representative counterclaim to enjoin collection of the taxes on ground that tax assessment was void because Statutory

Notice of Deficiency upon which assessment was predicated had not been mailed to taxpayer at his last known address. The United States District Court for the Southern District of Ohio (164 F. Supp. 874) entered judgment for the United States, and transferee - personal representative appealed. The Court of Appeals held that where prior to his death income-taxpayer had filed with District Director of Internal Revenue a Power of Attorney in which taxpayer authorized and requested that all communications and other matters be mailed to address of the named attorney in fact, Director's mailing by registered mail of Statutory Notice of Deficiency to such attorney after taxpayer's death constituted a minimum compliance with the mailing procedure authorized by the Internal Revenue Code, even though attorney returned Notice to Director with advice that Power of Attorney had been revoked by taxpayer's death, and though Director had on file a residence and business address for the taxpayer."

B.

STATEMENT OF FACTS

(Taken from Government Brief in Lower Court)

In 1953 an investigation was conducted by the Internal Revenue Service into the income tax liabilities of Percy L. Williams for the years 1944, 1945 and 1946, which investigation culminated in late 1955. On July 28, 1954, Percy L. Williams filed with the District Director of Internal Revenue for the District of Ohio a power of attorney wherein Percy L. Williams appointed Sol Goodman as his attorney with respect to all matters involving federal taxes, particularly for the years 1944, 1945, 1946 and 1948. (Compl. par. V; Ans. par. III; Govt. Ex 1-E.) Mr. Williams' residence *at that time was 1352 William Howard Taft Road, Cincinnati, Ohio.* The power of attorney also

authorized and requested that all communications and other matters be *mailed to Sol Goodman,* 1016 Union Trust Building, Cincinnati, Ohio. (Compl. par. V; Ans. par. III, IV; Govt. Ex. 1-E.)

Percy L. Williams died November 3, 1955.

Thereafter, on December 2, 1955, the Commissioner of Internal Revenue sent by registered mail a statutory notice of deficiency notifying Percy L. Williams of proposed deficiencies in income tax and penalties for the years 1944, 1945 and 1946 to *Percy L. Williams, care of Sol Goodman,* 1016 Union Trust Building, Cincinnati, Ohio. (Govt. Ex. 1-D.)

Prior to December 2, 1955, no notice of fiduciary relationship was ever filed by or on behalf of Mrs. Mary Jo Williams with the Commissioner of Internal Revenue or with the District Director of Internal Revenue for the District of Ohio or their representatives. (Compl. par. XI; Ans. par. VIII.)

On December 7, 1955, the office of the District Director of Internal Revenue at Cincinnati received the statutory notice of deficiency referred to above from Mr. Sol Goodman, advising that his Power of Attorney was revoked by death of Williams. (Govt. Ex. 1-G.) Thereafter, on December 8, 1955, the District Director returned the statutory notice to Sol Goodman. (Compl. par. VII-e; Ans. par. IV; Govt. Ex. 1-H.)

On December 21, 1955, the defendant, Mary Jo Williams, was appointed Administratrix of the Estate of Percy L. Williams. No Petition on behalf of Percy L. Williams or his estate was filed with the Tax Court of the United States within ninety (90) days of the issuance of the statutory notice. Thereafter, on March 30, 1956, the Commissioner of Internal Revenue made a deficiency assessment of income taxes and penalties for the years 1944, 1945 and 1946 as follows (Compl. par. IX; Govt. Exs. 1-A, 1-H):

Kind of Assessment	1944	1945	1946
Income Tax	$9,806.09	$2,603.88	$1,250.68
Interest	6,496.29	1,568.75	678.45
293 (b) Fraud Penalty	5,593.38	1,301.94	625.34
294 (d) Penalty	423.60	187.25	

These assessments were for the same years and same amounts as set out in the statutory notice of deficiency issued by the Commissioner of Internal Revenue to Percy L. Williams on December 2, 1955. *Notice was given to and demand made for the taxes and penalties assessed on April 2, 1956.* (Govt. Exs. 1-B, 1-C and 4.) Notice of tax lien in the amount of $30,535.56 was filed with the Recorder of Hamilton County, Cincinnati, Ohio, on April 23, 1956 (Govt. Ex. 3.).

On *August 17, 1956*, the Acting District Director of Internal Revenue for the District of Ohio filed with the Administratrix, Mary Jo Williams, a statement of claim of taxes due the United States from the Estate of Percy L. Williams in the amount of $30,535.56. (Compl. par. XII-a; Ans. par. VIII; Govt. Ex. 6.) The claim was rejected and disallowed on September 14, 1956, by the defendant. (Compl. par. XII-b; Ans. par. VIII; Govt. Ex. 6.)

The Power of Attorney provided that all communications be mailed *to* Sol Goodman. It did not authorize the mailing of notices to Percy L. Williams care of Sol Goodman. It did not indicate that Percy Williams' address was in care of Sol Goodman.

From those facts, the following questions arise:

1. Where a taxpayer whose address, both residence and business, is known by the Commissioner, and the Commissioner has on file a Power of Attorney designating that notices are to be mailed to said attorney, and the Commissioner instead mails a notice to the taxpayer in care of the attorney, who immediately returns such notice to the Commissioner and advises him that the taxpayer is de-

ceased, is such a notice compliance with the provisions of the Internal Revenue Code?

2. Where the Commissioner knows the taxpayer's last address at both his business and residence, does the Commissioner comply with even the "minimum" requirements of law by sending a notice to an attorney whose power to act as attorney had been revoked by death?

3. May the Commissioner institute an action in the District Court to have a tax liability established without first issuing the required Statutory Notice of Deficiency?

4. Where, as in this case, it is evident that the amount claimed is in excess of the total estate of the deceased taxpayer, thus making it impossible to pay the assessed tax and sue for a refund, can the Courts effectively deny a taxpayer the relief provided by either 28 U.S.C., Section 1346 (a) (1) through a suit in the District Court after payment (*Flora* v. *U. S. A.*, 357 U.S. 63) as well as deny the taxpayer the right of a hearing in the Tax Court of the United States for a redetermination of the tax.

5. Where no congressional enactment provides for a proceeding for the determination as well as the collection of Income Taxes, may a United States District Court entertain a proceeding like the present one?

C.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Court of Appeals for the Sixth Circuit decided a Federal question of substance in a manner contrary to the decision by the United States Court of Appeals, District of Columbia Circuit, in the case of *D'Andrea* v. *C. I. R.*, 263 F.2d 904.

2. The decision of the Court of Appeals for the Sixth Circuit is in conflict with and contrary to the holding in

First National Bank of Chicago, Trustee, v. *C. I. R.*, 255 F.2d 759.

3. The decision of the Court of Appeals for the Sixth Circuit is in conflict with the decision in the case of *Steiner* v. *Nelson*, 259 F.2d 853.

4. The decision of the Court of Appeals for the Sixth Circuit is in conflict with the decision of this Court in the case of *Flora* v. *U. S.*, 357 U.S. 63.

5. Unless a decision is made by this Honorable Court upon the state of facts existing in the present case, a great confusion will arise in the administration of the Internal Revenue laws of the United States in view of the conflict between the decisions of the different circuits of the Court of Appeals as well as the decisions of different members constituting the Sixth Circuit of the Court of Appeals and the conflict of the decision herein with a prior decision of the United States Supreme Court.

WHEREFORE, these petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Sixth Circuit commanding that Court to certify and to send to this Court for its review and determination, on a day therein named, a full and complete transcript of

IV.

SPECIFICATION OF ERRORS

1. The Court of Appeals for the Sixth Circuit erred in affirming the decision of the United States District Court. The Court of Appeals should have reversed and ordered a dismissal of the action on the ground that there is no congressional enactment providing for such an action.

2. The Court of Appeals for the Sixth Circuit erred in finding that the petitioners were liable for the tax, and that the individual petitioner was liable as transferee.

3. The Court of Appeals erred in finding that a sufficient Notice of Deficiency had been issued by the Commissioner.

ARGUMENT

I.

On February 27, 1959, the Court of Appeals for the Sixth Circuit affirmed the United States District Court decision in this case. In the Opinion of the Court, it was stated:

> "The Commissioner of Internal Revenue sent the challenged notice of deficiency by registered mail addressed *to the taxpayer* in care of and at the address of the attorney in fact *as requested and directed in the* power of attorney on file".

The Power of Attorney clearly shows that such mailing was contrary to the instructions contained therein, which were:

> "I authorize and request that all communications regarding any matter or matters * * * be sent to Sol Goodman * * *".

Nothing in the Power of Attorney designated the address of Percy L. Williams as in care of Sol Goodman. The Court of Appeals then states in its Opinion:

> "The attorney returned the notice to the District Director, advising that his power of attorney had been revoked by the death of the taxpayer".

At that precise moment, this Court, in the interest of justice, ought to give due and serious consideration whether or not the District Director performs his duties, if he does nothing further. Does Internal Revenue Code Section 6212 (b) (1); 6213 (a), (c), 7421, 26 U. S. C. A., etc. impose any duty or obligation on the part of the Dis-

trict Director when he finds that the taxpayer to whom he is required to give notice is deceased? The Statute gives him a right to send the registered mail notice to the taxpayer's last known address. *Nothing in the power of attorney involved in this case designates the attorney's address as the taxpayer's last known address.* It only authorizes the District Director to send communications concerning his tax matters to the attorney, not to the taxpayer in care of the attorney.

The Court, in its Opinion, states:

> "Appellants' contention that the assessment is void because the notice of deficiency was not sent to the "last known address" of the taxpayer, is based upon the fact that the District Director had in his file a residence address and a business address of the taxpayer."
>
> "But revocation of the power of attorney did not erase the taxpayer's request therein to the Director that 'all communications and other matters be mailed' *to the taxpayer at the attorney's address.*"

This statement, in the Opinion, is directly contrary to the express provisions of the power of attorney. Nowhere in the power of attorney is there authority to mail communications and other matters *to the taxpayer at the attorney's address.*

The Court further states in the Opinion:

> "While we must agree with appellants that here the Director did not exert himself to see that the notice of deficiency reached proper hands, *still we cannot say there was not minimum compliance with the mailing procedure authorized by* § 6212 * * *."

It is a far cry from justice to have this Court justify the Director's conduct in this case as "there was not minimum compliance". The requirement of the Statute is that there be a notice to the taxpayer. Clearly, in this case, notice

never reached the taxpayer or the taxpayer's representative. The authority of the attorney, as the Court points out in the Opinion, ceased with the death of the taxpayer.

In an Opinion filed by the United States Court of Appeals for the District of Columbia Circuit, *D'Andrea* v. *Commissioner of Internal Revenue*, 263 F.2d 904, we see a totally different consideration by that Circuit Court of Appeals of the rights of the taxpayer. In that case, the power of attorney did designate the taxpayer's address. It further authorized the sending of communications to the attorney. In that case, the Commissioner sent a registered mail notice to the taxpayer at the address given, and this was returned. He sent a copy of the notice to the attorney and, apparently, notice reached the taxpayer within the ninety days because, during that time, a Petition was prepared and mailed and reached the Tax Court of the United States on the 91st day. The Court of Appeals, in that decision, considered the language of the power of attorney and concluded that the Commissioner had not performed his duty in mailing the registered mail to the taxpayer at an address, which was not his address at the time of the mailing, or the mailing of a copy of the notice to the attorney, and the Court reversed the holding of the Tax Court and ordered the Entry of a Judgment, finding that the ninety day notice was not legally given. It is interesting to note that the Court of Appeals considers the language in the present case in the decision of *United States* v. *Williams*, 164 F. Supplement 874, that being the decision of Judge Druffel and quotes the language from the power of attorney in said decision.

We ask the Court's attention and examination of the language contained in the power of attorney in the *D'Andrea case*, which states, "And I hereby request and direct that all correspondence, documents, warrants or other data in connection with this matter be sent *in care of Charles*

H. Renthal". Compare that with the language of the power of attorney in the present case in which it is set forth "authorize and request that all communications concerning his tax matters be mailed to Sol Goodman". Nothing here authorized the Director to send a notice to Williams in care of Sol Goodman.

In commenting on the decision in *Commissioner of Internal Revenue* v. *Stewart*, 186 F.2d 239, the Court stated:

> "• • • where the Sixth Circuit held notice by registered mail to the taxpayer's attorney in fact was sufficient. There the attorney in fact was acting under a broader power than we have here; the notice was registered and the taxpayer was held to have waived any infirmity in the giving of notice by duly filing a Petition for redetermination in the Tax Court within the 90-day period, thereby showing that he seasonably received the information contained in the notice to his attorney."

This Court in *Flora* v. *United States*, 357 U.S. 63 stated:

> "A taxpayer too poor to pay the full amount of the tax wrongfully assessed or collected may litigate in the Tax Court of the United States without any advance payment".

The Statement of Facts set forth herein indicates that the tax assessed and interest will run approximately Forty Thousand ($40,000.00) Dollars. The record further indicates that the total estate will not amount to half of that. It is thus obvious that it is impossible to pay the tax and sue for a refund. The only avenue for relief left for the taxpayer was a proper Notice of Deficiency upon which could be based a Petition to the Tax Court of the United States. This clearly illustrates how real and substantial is the right of the taxpayer to a Notice of Deficiency. Under such circumstances, the duty of the Court is to

give effect to the intent of Congress, and in so doing, of course, your first reference is to the literal meaning of words employed. The answer is not in the decision of the Court of Appeals, which overlooks the language in the Power of Attorney and concludes that "still we cannot say there was not minimum compliance with the mailing procedure authorized by Section 6212 * * *". *Property rights should never be taken under any theory of "minimum compliance." The better rule is to give the taxpayer "maximum protection."*

II.

FAILURE TO FILE TIMELY CLAIM BARRED ACTION

The taxpayer further contends that Ohio Revised Code 2117.06, requiring that creditors having claims against an estate must present the claims to the executor in writing within four (4) months. Ohio Courts hold (*Prudential Insurance Company* v. *Joyce Building Realty Company*, 143 O. S. 364) that this is a Statute of Limitation, which bars creditors' claims unless presented to an Executor. The admitted fact herein is that this Statute was disregarded by the United States. The United States Court of Appeals failed to comment on this contention in its Opinion. This was directly in conflict with *Rice* v. *Sayers*, 198 F.2d 724; *Nelson* v. *Miller*, 201 F.2d 277; and the decision of this Court in *Commissioner of Internal Revenue* v. *Stern*, 357 U.S. 39.

III.

COURT LACKED JURISDICTION

We have heretofore pointed out that there is no statutory provision for a proceeding of this sort. If the Com-

missioner had a valid lien, and this were an action for the foreclosure of such a lien, then, of course, the taxpayer was not entitled to have the District Court consider the issue as to whether or not there was tax liability. The Court of Appeals overlooked mentioning this point in its Opinion, but, during oral argument, indicated that though it found no Statute providing for such a hearing in District Court, yet error, if any existed, was cured because the District Court did not preclude the taxpayer from offering evidence. It is our contention that if a proceeding is had in the District Court where the Court lacks jurisdiction that a litigant is not required to try his case before a Court having no jurisdiction over the subject matter.

IV.

NO DEFICIENCY NOTICE TO TRANSFEREE

The Complaint charged one of the petitioners with liability as a Transferee. This was in violation of 26 U. S. C., Section 6212, which requires that a Statutory Notice of Deficiency be sent to the Transferee. No claim was made that such a Notice was ever sent.

CONCLUSION

This case presents a question where the entire estate left by a taxpayer to his widow is being appropriated by the Government under the guise of its Internal Revenue Laws with a total failure to afford the taxpayer the protection afforded him by the Statute to have a hearing before the Tax Court of the United States. The decision of the Court of Appeals is "apologetic", but nevertheless, deprives the appellants of their property without due process of law under the semblance of "minimum compliance" by the Government.

The decision of the Court of Appeals is in conflict with other Courts of Appeal decisions and in conflict with what this Court has previously stated. This presents a case of a gross and grave miscarriage of justice and justifies the review and consideration by this Court.

Respectfully submitted,

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APPENDIX

2117.06. Presentation and Allowance of Creditors Claims; Property Tax Assessments.

All creditors having claims against an estate shall present their claims to the executor or administrator in writing, including claims arising out of contract, out of tort, or cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated. All claims shall be presented within four months after the date of the appointment of the executor or administrator . . .

2117.07 (10509-134). Presentation of Claims After Four Months.

Anyone having a claim against an estate who fails to present his claim to the executor or administrator within the time prescribed by law may file a petition in the probate court for authority to present his claim after the expiration of such time. Such petition forthwith shall be assigned for hearing and at least five days before the date of the hearing the claimant shall give written notice thereof to the executor or administrator and to such other parties as the court may designate. The court may authorize such claimant to present his claim to the executor or administrator if, on the hearing, the court finds as follows:

(A) That the claimant did not have actual notice of the decedent's death or of the appointment of the executor or administrator in sufficient time to present his claim within the period prescribed by section 2117.06 of the Revised Code;

(B) That the claimant's failure to present his claim was due to the absence of the executor or administrator from

his usual place of residence or business during a substantial part of such period or was due to any wrongful act or statement on the part of the executor or administrator or his attorney;

(C) That the claimant was subject to any legal disability during such period or any part thereof.

A claim which is not presented within nine months from the appointment of the executor or administrator shall be forever barred as to all parties, including devisees, legatees, and distributees and no payment shall be made nor any action maintained thereon, except as otherwise provided in sections 2117.37 to 2117.42, inclusive, of the Revised Code, with reference to contingent claims.

The executor or administrator is not accountable to any such claimant for any assets which he may lawfully have paid of or distributed prior to service upon him of notice of the hearing on such petition, nor for any other action which he may lawfully have taken prior to such time; and such claim shall not prevail against creditors, legatees, and distributees who have received payment or distribute on from the assets prior to the service of such notice, or against a surviving spouse who has made her election to take under the will or under sections 2105.01 to 2105.21, inclusive, of the Revised Code, prior to such time, or against bona fide purchasers and other persons who have dealt with the executor or administrator in good faith.

This section applies to any person who is required to give written notice to the executor or administrator of a motion or application to revive an action pending against the decedent at the date of death. (125 v 903. Eff. 10-1-53.)

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided February 27, 1959.)

(CAPTION OMITTED)

Before: MARTIN, Chief Judge; ALLEN, Circuit Judge, and MATHES, District Judge.

PER CURIAM:

A deceased Ohio taxpayer's transferee and personal representative appeals from a judgment decreeing, among other relief, foreclosure of the Government's lien for income taxes, and dismissal of a counterclaim to enjoin collection of the taxes, claimed under an assessment made after notice of deficiency allegedly given as required by statute. [Int. Rev. Code, §§ 6212 (b) (1), 6213 (a), (c), 7421, 26 U. S. C. A., §§ 6212 (b) (1); 6213 (a); (c), 7421.]

Appellants contend that the assessment is void because the statutory notice of deficiency upon which it is predicated was not mailed to the taxpayer "at his last known address" within the meaning of Int. Rev. Code, § 6212 (b) (1).

There is no dispute as to the facts. A little more than one year prior to his death on November 3, 1955, the taxpayer had filed with the District Director of Internal Revenue for the District of Ohio a power of attorney wherein the taxpayer "authorized and requested that all communications and other matters be mailed to the following address: . . . [the name and address of his attorney in fact]."

On December 2, 1955, prior to the appointment of a personal representative to administer the estate of the dece-

dent and before any notice of fiduciary relationship was filed under Int. Rev. Code, § 6903, the Commissioner of Internal Revenue sent the challenged notice of deficiency by registered mail addressed to the taxpayer in care of and at the address of the attorney in fact as requested and directed in the power of attorney on file. The attorney returned the notice to the District Director, advising that his power of attorney had been revoked by the death of the taxpayer.

No petition for a redetermination of the claimed deficiency was ever filed with the Tax Court on behalf of the taxpayer or his estate, and the assessment in controversy followed. [Int. Rev. Code, § 6213 (a), (c); *cf. United States* v. *Flora*, 357 U. S. 63 (1958).]

Appellants' contention that the assessment is void because the notice of deficiency was not sent to the "last known address" of the taxpayer, is based upon the fact that the District Director had in his file a residence address and a business address of the taxpayer.

It is true of course, as appellants say, that death of the taxpayer revoked the authority of the attorney. [*Hunt* v. *Rousmanier's Administrators*, 21 U. S. (8 Wheat.) 173 (1823).] But revocation of the power of attorney did not erase the taxpayer's request therein to the Director that "all communications and other matters be mailed" to the taxpayer at the attorney's address.

While we must agree with appellants that here the Director did not exert himself to see that the notice of deficiency reached proper hands, still we cannot say there was not minimum compliance with the mailing procedure authorized by § 6212 (a), (b) (1) of the Internal Revenue Code. [*Cf.*: *Dolezilek* v. *Commissioner*, 212 F. 2d 458 (D.C. Cir. 1954); *Commissioner* v. *Stewart*, 186 F. 2d 239 (6th Cir. 1951); *Clark's Estate* v. *Commissioner*, 173 F. 2d 13 (2d Cir. 1949); *Welch* v. *Schweitzer*, 106 F. 2d 885 (9th

Cir. 1939); *Dilks* v. *Blair*, 23 F. 2d 831 (7th Cir. 1927); *Gregory* v. *United States*, 57 F. Supp. 962 (Ct. Cl. 1944), *cert. denied*, 326 U. S. 747 (1945).]

Upon the findings of fact and conclusions of law made by District Judge Druffel, the judgment is affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

(CAPTION OMITTED)

This cause, having come on for trial before the Court, sitting without a jury, on the 19th day of February 1958, and the Court having heard the testimony, examined the evidence and the briefs filed by the respective parties, and being fully advised in the premises thereof, hereby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This action was authorized by the Commissioner of Internal Revenue, a delegate of the Secretary of the Treasury and was brought under the direction of the Attorney General of the United States.

2. Mary Jo Williams resides at 1352 William Howard Taft Road, Cincinnati, Ohio, and prior to his death, Percy L. Williams also resided in Cincinnati, Ohio.

3. On July 28, 1954, Percy L. Williams filed with the District Director of Internal Revenue of Ohio a power of attorney with respect to all matters involving his federal taxes, particularly for the years 1944, 1945, 1946, and 1948. This power of attorney authorized and requested

that all communications relative to Williams' tax matters be mailed to Mr. Sol Goodman, 1016 Union Trust Building, Cincinnati, Ohio.

4. In 1953 an investigation was conducted by the Internal Revenue Service into the income tax liabilities of Percy L. Williams for the taxable years 1944, 1945, and 1946. This investigation was culminated late in 1955.

5. Percy L. Williams died on November 3, 1955.

6. On December 2, 1955 the Commissioner of Internal Revenue issued a statutory notice of deficiency (90-day letter) to Percy L. Williams asserting a deficiency of income taxes, plus penalties and interest for the taxable years 1944, 1945, and 1946. The statutory notice of deficiency was sent by registered mail to Mr. Percy L. Williams, c/o Sol Goodman, 1016 Union Trust Building, Cincinnati, Ohio.

7. Prior to the issuance of the statutory notice of deficiency there had never been filed with the Commissioner of Internal Revenue or the District Director of Internal Revenue for Ohio any notice of fiduciary relationship on behalf of Mary Jo Williams.

8. On March 30, 1956, the Commissioner of Internal Revenue made a deficiency assessment of income taxes, penalties and interest against Percy L. Williams for the taxable years 1944, 1945, and 1946 as follows:

Kind of Assessment	1944	1945	1946
Income Tax	$ 9,806.09	$2,603.88	$1,250.68
Interest	6,496.19	1,568.75	678.45
293(b) Fraud Penalty	6,593.38	1,301.94	625.34
294(d) Penalty	423.60	187.26	---
	$22,319.26	$5,661.83	$2,554.47

These assessments were for the same years and in the same amounts as set out and asserted in the statutory notice of deficiency sent to Percy L. Williams on December 2, 1955.

9. On April 2, 1956, notice was given and demand made for the payment of the taxes, penalties and interest as assessed on March 30, 1956.

10. Notice of tax lien in the sum of $30,535.56, representing the taxes, penalties and interest as assessed against Percy L. Williams, on March 30, 1956, was filed with the Recorder of Hamilton County, Cincinnati, Ohio, on April 23, 1956.

11. No part of the assessment made against Percy L. Williams on March 30, 1956, has been paid.

12. The deficiencies in income taxes asserted and assessed against Percy L. Williams on March 30, 1956, were due to fraud on the part of Percy L. Williams with an intent to evade tax.

13. On August 17, 1956, the Acting District Director of Internal Revenue of Ohio filed with Mary Jo Williams, the administratrix of the estate of Percy L. Williams, a statement of claim for taxes as assessed on March 30, 1956, in the total amount of $30,535.56.

14. On September 14, 1956, Mary Jo Williams, administratrix of the estate of Percy L. Williams acknowledged that the claim was filed and gave notice that said claim was rejected and disallowed. No part of the claim filed with Mary Jo Williams has been paid to this date.

15. At the time of his death, Percy L. Williams was the owner of real property and improvements thereon described as:

> Part Lot 9 F.B Williams Sub. Cinti. Hamilton County known as 1352 William Howard Taft Road. Auditor Pl. 62-1-106

16. Also at the time of his death, Percy L. Williams was the owner of the following personal property:

Cash on hand	$1,500.00
Central Trust Co. account	19.25
1954 Ford Tudor automobile Model U4 Serial No. U4NC147404	
51 Shares of Stock in Playbowl, Inc., held by F. D. Henry, Trustee	

17. At the time of his death, Percy L. Williams was also the owner of a certain contract right resulting from an agreement with Mrs. Ruth Levitch and that at present, under such contract agreement there is due and owing from Mrs. Levitch to the estate of Percy L. Williams the sum of $4,870.46.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action by virtue of Sections 1340 and 1345, Title 28 U.S.C.

2. The statutory notice of deficiency issued by the Commissioner of Internal Revenue and sent by registered mail on December 2, 1955, was sent to the last known address of Percy L. Williams within the meaning of Section 272 (a) and (k) of the Internal Revenue Code of 1939.

3. Mary Jo Williams is indebted to the United States of America as administratrix of the estate of Percy L. Williams in the sum of $30,535.56 plus interest from the date of the assessment until paid.

4. The United States of America has a lien for taxes in the sum of $30,535.56 plus interest until paid on all property, real and personal still in control of the defendant, Mary Jo Williams, either as administratrix of the estate of Percy L. Williams or as distributee of the estate of Percy L. Williams.

5. The United States of America has a lien for federal taxes on the sum of $4,870.46 that is due from Mrs. Ruth Levitch to the estate of Percy L. Williams.

6. The United States of America is entitled to have its lien for taxes foreclosed against any assets remaining in the control of Mary Jo Williams either as administratrix of the estate of Percy L. Williams or as distributee of the estate of Percy L. Williams.

7. The United States is entitled to a deficiency judgment against Mary Jo Williams as administratrix of the estate of Percy L. Williams in the amount of any assessment remaining unsatisfied after any foreclosures or payments against the tax liabilities pursuant to this action, plus interest until paid.

JOHN H. DRUFFEL
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 199

MARY JO WILLIAMS, ADMINISTRATRIX OF THE ESTATE OF PERCY L. WILLIAMS AND MARY JO WILLIAMS, TRANSFEREE OF THE ASSETS OF PERCY L. WILLIAMS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (Pet. 5a–9a) are reported at 164 F. Supp. 874. The opinion of the court of appeals (Pet. 3a–5a) is reported at 264 F. 2d 227.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1959. A timely petition for rehearing was denied on April 10, 1959. The petition for a writ of certiorari was filed on July 9, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory notice of deficiency issued by the Commissioner was sent to the last known address of the deceased within the meaning of Section 272 (a) and (k) of the Internal Revenue Code of 1939.

2. Whether this action was barred because of the alleged failure to comply with Ohio statutes of limitation.

3. Whether the district court lacked jurisdiction through absence of statutory authorization for the action brought by the United States against the administratrix of the deceased taxpayer.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of Sections 272 and 312 of the Internal Revenue Code of 1939, and Treasury Regulations 111, Section 29.312–1, are set forth in the Appendix, *infra*, pp. 14–17.

STATEMENT

During the years 1944, 1945, and 1946, Percy L. Williams resided in Cincinnati, Ohio, and derived income from various sources in that vicinity, including the operation of a lottery and numbers business (R. 22–23).[1]

On July 28, 1954, Percy L. Williams filed with the District Director of Internal Revenue of Ohio a power

[1] "R." refers to the appendix to the taxpayer's brief in the court of appeals; "Supp. R." refers to the appendix to the brief for the United States in the court of appeals.

of attorney with respect to all matters involving his federal taxes, particularly for the years 1944, 1945, 1946, and 1948. This power of attorney authorized and requested that all communications relative to Williams' tax matters be mailed to Mr. Sol Goodman, 1016 Union Trust Building, Cincinnati, Ohio. Percy L. Williams died on November 3, 1955 (R. 37–38).

In 1953 an investigation was conducted by the Internal Revenue Service into the income-tax liabilities of Percy L. Williams for the taxable years 1944, 1945, and 1946. This investigation was concluded late in 1955. Computations of internal revenue agents, based on the ascertainable net worth of Percy L. Williams, revealed that he had understated his net income on his returns for the three taxable years in the following amounts (Exs. 1-D, 2; Supp. R. 5, 1b-11b):

	1944	1945	1946	Total
Net income disclosed on return	$2,708.26	$15,329.33	($15,808.15)	$2,229.44
Net income as corrected	27,091.43	20,262.58	6,832.72	54,186.73
Adjustment to income	24,383.17	4,933.25	22,640.87	51,957.29

On December 2, 1955, the Commissioner of Internal Revenue issued a statutory notice of deficiency (90-day letter) to Percy L. Williams asserting a deficiency of income taxes, plus penalties and interest, for the taxable years 1944, 1945, and 1946 as follows (Ex. 1-D, Supp. R. 1b–11b):

Kind of assessment	1944	1945	1946
Income tax	$9,806.09	$2,603.88	$1,250.68
Interest	6,496.19	1,508.75	678.45
293(b) fraud penalty	5,593.38	1,301.94	625.34
294(d) penalty	423.60	187.25	

The statutory notice of deficiency was sent by registered mail to Mr. Percy L. Williams, c/o Sol Goodman, 1016 Union Trust Building, Cincinnati, Ohio. (R. 38–39). On December 7, 1955, the District Director of Internal Revenue at Cincinnati received back the notice of deficiency from Goodman as well as notification that Goodman's power of attorney had been revoked by the death of Goodman (Ex. 1–G; Pet. 4). The District Director returned the notice of Goodman on the following day (Ex. 1–H; Pet. 4).

Prior to the issuance of the statutory notice of deficiency there had never been filed with the Commissioner of Internal Revenue or the District Director of Internal Revenue for Ohio any notice of fiduciary relationship on behalf of Mary Jo Williams (R. 38). On December 21, 1955, Mary J. Williams was appointed administratrix of the estate of Percy L. Williams.

On March 30, 1956, the Commissioner of Internal Revenue made a deficiency assessment of income taxes, penalties, and interest against Percy L. Williams for the same years and in the same amounts as was set out and asserted in the statutory notice of deficiency sent on December 2, 1955. On April 2, 1956, notice was given and demand made for the payment of the taxes, penalties, and interest as assessed on March 30, 1956. Notice of a tax lien in the sum of $30,535.56, representing the taxes, penalties, and interest as assessed against Percy L. Williams on March 30, 1956, was filed with the Recorder of Hamilton County, Cincinnati, Ohio, on April 23, 1956. No

part of the assessment made against Percy L. Williams on March 30, 1956, has been paid (R. 38, 39).

On August 17, 1956, the Acting District Director of Internal Revenue of Ohio filed with Mary Jo Williams, the administratrix of the estate of Percy L. Williams, a statement of claim for taxes as assessed on March 30, 1956, in the total amount of $30,535.56. On September 14, 1956, Mary Jo Williams, as administratrix of the estate, acknowledged that the claim was filed and gave notice that the claim was rejected and disallowed. No part of the claim filed with Mary Jo Williams has been paid. At the time of his death, Percy L. Williams was the owner of real property and improvements, personal property, and certain contract rights (R. 39–40).

A complaint was filed on November 9, 1956, by the United States against Mary Jo Williams, as administratrix of the estate of Percy L. Williams, to have its lien for unpaid taxes impressed upon any remaining assets in the estate and to have the lien foreclosed; and for a judgment against Mary Jo Williams, as administratrix and distributee, for the amount of the deficiency, plus penalties and interest (R. 22–29). On December 21, 1956, the taxpayer filed an answer and cross-complaint asking for an order enjoining the United States from proceeding with the action. (R. 30–33).

The district court found that the deficiencies in income taxes asserted and assessed against Percy L. Williams on March 30, 1956, were due to fraud with intent to evade the tax, and it held (1) that the

statutory notice of deficiency was sent to the last known address of Percy L. Williams within the meaning of Section 272 (a) and (k) of the Internal Revenue Code of 1939; (2) that the taxpayer as administratrix is indebted to the United States until the deficiency, plus penalties and interest from date of the assessment, are paid; (3) that the United States has a lien for unpaid taxes on all property, real and personal, still in the control of the taxpayer either as administratrix or as distributee; (4) that the United States has a lien against assets in the estate, including fifty-one shares of stock of Playbowl, Inc., held by F. D. Henry as trustee for Percy L. Williams, and the sum of $4,870.46 due from Mrs. Ruth Leviteh under a contract (R. 39–41).

The district court dismissed the taxpayer's cross-complaint and ordered that the real and personal property in taxpayer's control as administratrix or distributee, as well as fifty-one shares of Playbowl, Inc., be sold and the proceeds used to satisfy or apply on the lien of the United States; that the amount due from Mrs. Levitch be paid to the United States to apply on its lien; and that the United States have a deficiency judgment against the taxpayer as administratrix in the amount of any assessment remaining unsatisfied after the foreclosure or payments (R. 42–43). The court of appeals affirmed (Pet. 3a–5a).

ARGUMENT

1. The taxpayer here contends (Pet. 8–12), as she did in the district court and in the court of appeals, that the notice of deficiency was not sent as required

by statute,[2] to the deceased's last known address. She specifically contends (Pet. 8–9) that, since the instruction in the power of attorney was to send all communications to Sol Goodman, and not to Williams in the care of Sol Goodman, the latter's address was not Williams' last known address. However, whether the statutory notice of deficiency issued by the Commissioner and sent by registered mail on December 2, 1955, was sent to the last known address of the deceased within the meaning of Section 272 (a) and (k) of the Internal Revenue Code of 1939, Appendix, *infra*, pp. 14–15, presents a factual question of no general importance. Moreover, this issue has been decided adversely to the taxpayer by both courts below, on evidence which fully supports the result.

By the power of attorney executed on July 27, 1954 (Ex. 1–E, Supp. R. 12b–13b), Williams not only appointed Sol Goodman to act for him in connection with any matters involving federal taxes, particularly for the years 1944, 1945, 1946, and 1948, but he also requested that all communications be sent to Sol Goodman, 1016 Union Trust Building, Cincinnati, Ohio. In accordance with that request, the Commissioner's notice of deficiency for the taxes involved was sent to Williams in care of Sol Goodman at 1016 Union Trust

[2] Although taxpayer cites and relies on Section 6212 of the 1954 Code (Pet. 8, 12, 13), that section applies only to taxes imposed by the 1954 Code for taxable years beginning after December 31, 1954 (see Section 7851(a)(1)(A) and (a)(6) of the 1954 Code). The corresponding section of the 1939 Code is Section 272 (a)(1) and (k), which is applicable to the taxable years 1944 to 1946 here involved. The provisions of Section 272 of the 1939 Code and Section 6212 of the 1954 Code are substantially the same.

Building, Cincinnati, Ohio (Ex. 1-D, Supp. R. 1b–2b). The fact that Williams' own name was added to the notice of deficiency served only to particularize the notice, and complied with Section 272(k) of the Internal Revenue Code of 1939, which requires that the notice be sent "to the taxpayer" at his last known address.

Under the terms of Section 272(k), notice of a deficiency is sufficient if mailed to the last known address of the taxpayer "even if such taxpayer is deceased." At the time the notice was sent, before Goodman returned it to the District Director, the Goodman address was the last address of petitioner known to the Commissioner. Moreover, while the death of Williams revoked the power of attorney, it "did not erase the taxpayer's request therein to the Director that 'all communications and other matters be mailed' to the taxpayer at the attorney's address" (Pet. 4a).[3]

The decisions below are not contrary to the decision of *D'Andria* v. *Commissioner*, 263 F. 2d 904 (C.A.D.C.), as alleged by the taxpayer (Pet. 6, 10–11). The *D'Andria* case involved a situation where a deficiency notice was sent by registered mail to the taxpayer at an address which was not the last known address in the files of the Commissioner, and the copy

[3] The taxpayer was not entitled to have a notice of deficiency sent to her since she was not appointed administratrix until after the notice of deficiency had been issued, and thus had not filed a notice of fiduciary relationship with the Commissioner under Section 312 of the 1939 Code, Appendix, *infra*, p. 15. See also Treasury Regulations 111, Sec. 29.312-1, Appendix, *infra*, pp. 15–17.

of the notice sent to the taxpayer's attorney was sent by ordinary mail. Thus neither the original nor the copy was mailed in accordance with the statutory requirements. In the instant case, the deficiency notice was sent by registered mail to the deceased taxpayer at his last known address. Since he had not notified the Commissioner of any subsequent change of address prior to his death on November 3, 1955, the address of Sol Goodman was the latest address ascertainable by the Commissioner from his files, and the notice of deficiency sent there fully complied with the statutory requirement. *Commissioner* v. *Stewart*, 186 F. 2d 239 (C.A. 6); *Clark's Estate* v. *Commissioner*, 173 F. 2d 13 (C.A. 2); *Welch* v. *Schweitzer*, 106 F. 2d 885 (C.A. 9); *Dilks* v. *Blair*, 23 F. 2d 831 (C.A. 7); *Gregory* v. *United States*, 57 F. Supp. 962 (C. Cls.), certiorari denied, 326 U.S. 747; *United States* v. *Lyman*, 36 F. Supp. 53 (D. Mass.), modified on other grounds, 125 F. 2d 67 (C.A. 1); *Trefry* v. *Commissioner*, 10 B.T.A. 134.*

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*Taxpayer's contention (Pet. 9-10) that she was deprived of her right to contest the deficiency in the Tax Court is not borne out by the record. The 90-day notice was mailed December 2, 1955. She was appointed administratrix on December 21, 1955. When the deficiency notice addressed to Williams in Goodman's care reached Goodman, he returned it to the District Director. After the deficiency notice was remailed to Goodman by the Director on December 8, 1955, Goodman sent it to Mr. Theodore Berry. Both Goodman and Berry appeared for the taxpayer in the courts below.

Taxpayer also suggests (Pet. 6, 11) that she was unable to pay the tax and sue for a refund in the tax court. Since, however, she has not filed an accounting (Supp. R. 18b) or otherwise shown the assets of the estate, the administrative expenses, or the distributions, it is impossible to ascertain from the record whether her claim is factually correct.

2. There is no merit to taxpayer's contention (Pet. 12) that the failure of the United States to file a claim with the administratrix within four months of her appointment, as required by Ohio law, barred this action. The Government has no duty to appear as a creditor in the state courts. *Field* v. *United States*, 9 Pet. 182, 200; *Viles* v. *Commissioner*, 233 F. 2d 376, 380 (C.A. 6); *United States* v. *Fisher*, 57 F. Supp. 410 (E.D. Mich.). Similarly, the United States is not bound by state statutes of limitation. *Phillips* v. *Commissioner*, 283 U.S. 589; *United States* v. *Summerlin*, 310 U.S. 414; *Taylor* v. *United States*, 324 Mass. 639, 88 N.E. 2d 121, certiorari denied, 338 U.S. 948. Therefore, the claim filed by the United States was not untimely.

After the United States filed its claim with the administratrix on August 17, 1956, and she had rejected it on September 14, 1956 (R. 39), this action was brought on November 7, 1956, or within the two months (R. 21) allowed by Ohio Rev. Code, Sec. 2117.12, to commence an action on such a rejected claim. Moreover, since actions under Section 2117.12 must be brought "in a court of general jurisdiction," rather than the probate courts (*In re Estate of Smith*, 67 Ohio L. Ab. 409, 412, 120 N.E. 2d 632; *In re Estate of Buchanan*, 82 Ohio App. 240, 81 N.E. 2d 409), the United States could properly bring this

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In *Rice* v. *Sayers*, 198 F. 2d 724 (C.A. 10), and *Nelson* v. *Miller*, 201 F. 2d 277 (C.A. 9), on which the taxpayer relies (Pet. 12), the United States was not a party. *Commissioner* v. *Stern*, 357 U.S. 39, involved the substantive liability of a beneficiary of a life insurance policy in transferee proceedings, and has no bearing on the issues here involved.

action in the federal district court. And, even if Ohio law had attempted to grant exclusive jurisdiction to the Ohio courts (see Ohio Rev. Code 2102.24), a federal district court could not be deprived of concurrent jurisdiction to decide the validity and amount of a federal tax claim. *United States* v. *Peoples Trust & Savings Co.*, 97 F. 2d 771 (C.A. 7). Thus, the United States, whether or not required to do so, complied with Ohio requirements with respect to bringing suit against an administratrix on a rejected claim.

3. The taxpayer attempts (Pet. 12-13) to attack the jurisdiction of the district court on the ground that there was no statutory authority for the action.[6] The jurisdiction of the district court rested on 28 U.S.C. 1345 and 1396, which together provide that "[a]ny civil action for the collection of internal revenue taxes may be brought" in the district courts. Under these provisions, the United States may sue a decedent's personal representative in a district court to recover a judgment for income taxes for years prior to the decedent taxpayer's death. *United States* v. *Peoples Trust & Savings Co., supra.* See also *United States* v. *E. Regensburg & Sons*, 124 F. Supp. 687 (S.D.N.Y.), affirmed, 221 F. 2d 336 (C.A. 2), certiorari denied, 350 U.S. 842. This suit against the taxpayer individually is brought to recover her liability as decedent's transferee or distributee; and, con-

[6] The taxpayer also suggests (Pet. 6, 13) that she was denied the opportunity to litigate the merits of the taxes. She could, however, have raised defenses to the merits of this action, if any valid defense existed, without in any way waiving her jurisdictional arguments. See Rule 12(b), F.R. Civ. P.

trary to her contention (Pet. 13), the United States may bring an action against a transferee under the trust fund doctrine, without notice or assessment. See *Phillips* v. *Commissioner*, 283 U.S. 589; *Viles* v. *Commissioner*, 233 F. 2d 376, 380 (C.A. 6). The action here is therefore valid as one brought in personam against the administratrix, whose liability rests on the fact that she is both the personal representative and a transferee or distributee of the deceased taxpayer.[7]

[7] We are not unmindful of the fact that a federal district court may not interfere with the administration of property in the custody of a state probate court. *Pufahl* v. *Estate of Parks*, 299 U.S. 217; *Penn Co.* v. *Pennsylvania*, 294 U.S. 189; *United States* v. *Peoples Trust & Savings Co.*, *supra*; *Hart* v. *United States*, 207 F. 2d 813 (C.A. 8). In Ohio, however, under the law prior to amendment of its Code (in 1938, 1953, and 1957; see Ohio Rev. Code, Secs. 2101, 2109 and 2117), it was clear that the probate courts did not have jurisdiction to distribute or to determine the merits of rejected claims against the estate. *Brown* v. *Routzahn*, 58 F. 2d 329, 333 (N.D. Ohio), reversed on other grounds, 63 F. 2d 914 (C.A. 6), certiorari denied, 290 U.S. 641; see *Collins* v. *Williamson*, 229 Fed. 59, 64–65 (C.A. 6). Even now, after those amendments, it is not entirely clear that the Ohio statute gives its probate courts sufficient jurisdiction over an estate to bar judgments in other courts regarding the disposition of its property. Cf. *United States* v. *Saxe*, 261 F. 2d 316 (C.A. 1) (a foreclosure action), with *United States* v. *First National Bank*, 54 F. Supp. 351 (N.D. Ohio). The taxpayer has not urged here or in the courts below that the Ohio probate courts now have such jurisdiction and, absent some showing, no such change can be presumed. Cf. *Helvering* v. *Fitch*, 309 U.S. 149, 155–156.

In addition, no accounting has been filed in the state probate court, and, indeed, the last paper there filed was the approval of the inventory. In such circumstances it has been and is impossible to determine what property of decedent has ever come under the control of the administratrix. Nor has it been possible to determine what part if any of decedent's estate has

CONCLUSION

For the reason stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
ABBOTT M. SELLERS,
Acting Assistant Attorney General.
A. F. PRESCOTT,
CAROLYN R. JUST,
Attorneys.

SEPTEMBER 1959.

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been distributed. Hence, it cannot be ascertained at this time what implementing orders, if any, must be obtained from the probate court before the Government's lien can be satisfied.

APPENDIX

Internal Revenue Code of 1939:

SEC. 272 [as amended by Sec. 203, Act of December 29, 1945, c. 652, 59 Stat. 669].

PROCEDURE IN GENERAL.

(a) (1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of

the joint notice must be sent by registered mail to each spouse at his last known address.

* * * * *

(k) *Address for Notice of Deficiency.*—In the absence of notice to the Commissioner under section 312(a) of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by this chapter, if mailed to the taxpayer at his last known address, shall be sufficient for the purposes of this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(26 U.S.C. 1952 ed., Sec. 272)

SEC. 312. NOTICE OF FIDUCIARY RELATIONSHIP.

(a) *Fiduciary of Taxpayer.*—Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this chapter (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated.

* * * * *

(c) *Manner of Notice.*—Notice under subsection (a) or (b) shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(26 U.S.C. 1952 ed., Sec. 312)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.312-1. *Fiduciaries.*—As soon as the Commissioner receives notice that a person is acting in a fiduciary capacity, such fiduciary must, except as otherwise specifically provided, assume the powers, rights, duties, and privileges of the taxpayer with respect to income tax imposed by chapter 1. * * * The "notice

to the Commissioner" provided for in section 312 shall be a written notice signed by the fiduciary and filed with the Commissioner. The notice must state the name and address of the person for whom the fiduciary is acting, and the nature of the liability of such person; that is, whether it is a liability for tax, and, if so, the year or years involved, or a liability at law or in equity of a transferee of property of a taxpayer, or a liability of a fiduciary under section 3467 of the Revised Statutes, as amended (paragraph 81 of the Appendix to these regulations), in respect of the payment of any tax from the estate of the taxpayer. * * * Unless there is already on file with the Commissioner satisfactory evidence of the authority of the fiduciary to act for such person in a fiduciary capacity, such evidence must be filed with and made a part of the notice. If the fiduciary capacity exists by order of court, a certified copy of the order may be regarded as such satisfactory evidence. * * *

If the notice of the fiduciary capacity described in the preceding paragraph is not filed with the Commissioner prior to the sending of notice of deficiency by registered mail to the last known address of the taxpayer (see section 272(a)), or the last known address of the transferee or other person subject to liability (see section 311), no notice of the deficiency will be sent to the fiduciary. In such a case the sending of the notice to the last known address of the taxpayer, transferee, or other person, as the case may be, will be a sufficient compliance with the requirements of the Internal Revenue Code, even though such taxpayer, transferee, or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence. Under such circumstances if no petition is filed with The Tax Court of the United States within 90 days after the mailing of the notice (or within 150 days after

mailing in the case of such a notice mailed after October 21, 1942, and addressed to a person outside the States of the Union and the District of Columbia) to the taxpayer, transferee, or other person, the tax, or liability under section 311, will be assessed immediately upon the expiration of such 90-day or 150-day period, and demand for payment will be made by the collector. The term "fiduciary" is defined in section 3797(a)(6) to mean a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

U.S. GOVERNMENT PRINTING OFFICE: 1939

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FILED
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JAMES R. BROWNING, Clerk

No. 199

Supreme Court of the United States

October Term, 1959

MARY JO WILLIAMS, Administratrix of the Estate of PERCY L. WILLIAMS and MARY JO WILLIAMS, Transferee of the Assets of PERCY L. WILLIAMS,
Defendants-Appellants,

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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In The

SUPREME COURT OF THE UNITED STATES
October Term, 1959

No. 199

MARY JO WILLIAMS, Administratrix of the Estate of PERCY L. WILLIAMS and MARY JO WILLIAMS, Transferee of the Assets of PERCY L. WILLIAMS,
Defendants-Appellants,

v.

UNITED STATES OF AMERICA
Plaintiff-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

The Brief for the United States in opposition to the Petition for a Writ of Certiorari makes certain erroneous statements. In the fifth line of Page 3, it is set forth, "This power of attorney authorized and requested that all communications relative to Williams' tax matters *be mailed to Mr. Sol Goodman* * * *". At the top of Page 4, "The statutory notice of deficiency was sent *by registered mail to Mr. Percy L. Williams*, c/o Sol Goodman * * *".

(1) **It is, thus, evident that the power of attorney merely designated a person as attorney and did not designate a place as an address.**

(2). It is, thus, obvious that the statutory notice of deficiency was not sent in accordance with the instructions in the power of attorney.

On Page 4, the Brief sets forth that prior to the issuance of the statutory notice of deficiency, there had never been filed a notice of fiduciary relationship on behalf of Mary Jo Williams.

(3) If the statutory notice of deficiency was set up on December 2, 1955, and the fiduciary was appointed on December 21, 1955, how could a notice of fiduciary relationship be filed prior to the appointment of the fiduciary?

On Page 5, it is pointed out that the Director of Internal Revenue filed his claim with the Administratrix on August 17, 1956. This is eight (8) months after the Administratrix was appointed, while the Ohio Statute requires the filing within four (4) months.

On September 14, 1956, the claim was rejected and disallowed. Ohio Statutes require that any relief against late filing must be by action directed to the Ohio Probate Court within nine (9) months. The rejection of the claim on September 14, 1956 was within that nine (9) month period. No action was filed by the United States of America in any Court within the nine (9) month period. The complaint filed in this action on November 9, 1956 was ten (10) months and two (2) weeks after the appointment of the Administratrix and was, therefore not timely.

On Page 7, it is set forth

> "However, whether the statutory notice of deficiency issued by the Commissioner and sent by registered mail on December 2, 1955, *was sent to the last known address of the deceased* within the meaning of Section 272 (a) and (k) of the Internal Revenue Code of

1939, Appendix, infra, pp. 14-15, *presents a factual question of no general importance.* Moreover, this issue has been decided adversely to the taxpayer by both courts below, on evidence *which fully supports the result.*"

It is difficult to comprehend how such a statement can be made. The Record established that the Director of Internal Revenue had Williams' home address and business address. The clear and concise language in the power of attorney only authorized sending notices to his attorney but did not specify his attorneys' office *as his last known address.* The District Court and the Court of Appeals did not find any factual differences between the parties. The facts are agreed upon. It is only their conclusion that *the designation of an attorney constitutes the designation of an address* that we differ with.

To see that there is no factual dispute, we quote from the Government's Brief at Page 7:

> By the power of attorney executed on July 27, 1954 (Ex. 1-E, Supp. R. 12b-13b), Williams not only appointed Sol Goodman to act for him in connection with any matters involving federal taxes, particularly for the years 1944, 1945, 1946, and 1948, *but he also requested that all communications be sent to Sol Goodman,* 1016 Union Trust Building, Cincinnati, Ohio. In *accordance* with that request *the Commissioner's notice of deficiency for the taxes involved was sent to Williams in care of Sol Goodman at 1016 Union Trust Building, Cincinnati, Ohio* (Ex. 1-D, Supp. R. 1b-2b)."

In the second sentence above, the conclusion is made that the notice was sent "in accordance with that request". To that extent, the lower Courts agreed with the Government. In that respect, we contend that the Government

and the lower Courts are wrong. The proper language should be "contrary to such request".

In view of the Government's Brief and our analysis thereof, as set forth herein, how can it be said that the decision by the Court of Appeals, Sixth Circuit, in the present case, *is not in conflict with D'Andrea v. Commissioner*, 263 F. 2d 904 (C.A.D.C.)?

We respectfully submit that the decisions by the lower Courts herein constitute a grave injustice to the taxpayer, deprive the taxpayer of any opportunity to a judicial hearing; deprive the taxpayer of the entire estate without an opportunity to be heard; is contrary to the great weight of authority, as indicated by the decisions of this Court and the decisions of Courts of Appeal; is contrary to the laws regulating estates, as set up under the laws of Ohio and the laws of the United States; and for those reasons, the Petition for a Writ of Certiorari should be granted.

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Sept., 1959